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December 18, 2008

VIA COURIER

Jeff S. Jordan
Supervisory Attorney
Complaints Examination &
Legal Administration
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
DEC 18 19 3 43

Re: MUR 6111
Columbus Metropolitan Club's Response to Amended Complaint

Dear Mr. Jordan:

This response, including attached exhibits, is submitted on behalf of the Columbus Metropolitan Club ("CMC") in response to the amended complaint filed by Mr. Bill Buckel on October 22, 2008, with regard to a political debate staged by WOSU Public Media ("WOSU") and CMC on October 16, 2008 for candidates seeking to represent the 15th Congressional District of Ohio (the "Debate"). For the reasons set forth below, CMC respectfully requests that the Federal Election Commission ("FEC" or "the Commission") activate this case and dismiss the amended complaint after determining that there is no reason to believe that CMC committed any violation of the Federal Election Campaign Act ("FECA") or FEC regulations.

Mr. Buckel's Amended Complaint

Mr. Buckel filed an initial complaint against WOSU on October 12, 2008. That complaint was rejected by the FEC on October 15, 2008 and Mr. Buckel was given instructions

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on how to properly style his complaint. On October 22, 2008, Mr. Buckel filed an amended complaint against WOSU and – for the first time – named CMC as a respondent. Mr. Buckel alleges in his amended complaint that WOSU's decision to exclude the Libertarian Party candidate, Mark Noble, from the Debate for failing to qualify under its "Debate Guidelines for Third-Party or Independent Candidates" ("Debate Guidelines") amounted to both WOSU and CMC giving the three participating candidates¹ "preferential exposure" and "vote-receiving advantage." Buckel Amended Complaint at 3. Mr. Buckel claims that WOSU and CMC, by excluding Mr. Noble from the Debate, were operating as "political action groups." Buckel Amended Complaint at 1. Finally, Mr. Buckel states that both WOSU and CMC "should be required to [register] and then be expected to file the required forms with the FEC." Buckel Amended Complaint at 3. Although Mr. Buckel's legal theory is not entirely clear, he appears to be alleging that by staging the Debate, WOSU and CMC made contributions or expenditures for the purpose of influencing a federal election and therefore violated 2 U.S.C. §§ 433 and 434 by failing to register as political committees and file regular reports with the Commission.

Statement of Facts

CMC is a corporation exempt from taxation as an organization described in Section 501(c)(3) of the Internal Revenue Code. It was established in 1976 to promote the open exchange of information and ideas among the residents of central Ohio by providing a forum for free expression and fair debate to examine many issues that confront the community, state, nation and the world. CMC provides the opportunity for discussion and debate among various viewpoints and constituencies through weekly forums. In the past year, it has planned and hosted 63 forums and debates with more than 183 local, regional, national and international speakers discussing health, art, politics, international relationships, the economy, business, social needs, civil liberties and other newsworthy topics. In planning and hosting these events, CMC strives to remain completely neutral and does not advertise, promote, endorse or otherwise advocate or oppose any person, candidate, position or ideology.

In anticipation of the November 4, 2008 general election in the 15th Congressional District of Ohio, WOSU and CMC entered into an agreement to co-sponsor the Debate. Under their agreement, CMC was to promote attendance, gather reservations, help with set design and collect and screen questions to be asked during the Debate, and WOSU was to, among other things, host the Debate. Importantly, at the time CMC entered into this agreement, WOSU had already determined which candidates would be invited to the Debate based on WOSU's Debate Guidelines. See Debate Guidelines attached as Exhibit A. The Debate Guidelines state that WOSU will offer debate opportunities to candidates "who have demonstrated a measurable

¹ The three candidates that qualified under WOSU's Debate Guidelines and participated in the Debate were Mary Jo Kilroy (D), Steve Stivers (R), and Don Eckhart (I).

chance of election to the office they seek." Exhibit A at 1. A measurable chance of election was defined by the Debate Guidelines as having at least 5% support in a poll or public opinion survey by an independent organization. *Id.* The Debate Guidelines state specifically that any candidate failing to meet this requirement would not be included in the Debate "because such participation will hinder the audience's understanding of the positions held by candidates who have a legitimate chance of winning election. The final decision of a candidate's inclusion in a debate rests with the management of WOSU Public Media." *Id.* at 2.

Mr. Buckel contacted WOSU on October 8, 2008 regarding Mr. Noble's inclusion in the scheduled Debate. Pursuant to its Debate Guidelines, however, WOSU determined that Mr. Noble was ineligible to participate in the Debate because he had failed to receive the requisite five percent support. *See, e.g.,* SurveyUSA Election Poll #14403 attached as Exhibit B.² WOSU informed Mr. Buckel of its decision to exclude Mr. Noble and shortly after the debate Mr. Buckel filed his amended complaint.

Legal Arguments

FECA requires that all political committees register and file regular reports with the Commission. 2 U.S.C. §§ 433, 434. The term "political committee" is defined by FECA as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 in a calendar year." 2 U.S.C. § 431(4)(A). Expenditures are broadly defined to include the giving of anything of value by any person for the purpose of influencing any federal election. 2 U.S.C. § 431(9)(A)(i). FECA, however, specifically excludes from the definition of the term "expenditure" any "nonpartisan activity designed to encourage individuals to vote or to register to vote." 2 U.S.C. § 431(9)(B)(ii). The Commission has consistently held that this provision provides a safe harbor for nonprofit organizations that stage candidate debates in accordance with FEC regulations. *See* First General Counsel's Report at 2-3, MUR 5378 (Commission on Presidential Debates); First General Counsel's Report at 5-6, MURs 4987, 5004, 5021 (Commission on Presidential Debates); *see also* First General Counsel's Report at 2, MURs 5817, 5836, 5847, 5852, 5858, and 5863.

Specifically, if the debate staging organization meets the requirements of 11 C.F.R. § 110.13(a)(1) and stages debates in accordance with 11 C.F.R. §§ 110.13(b) and (c) and 114.4(f), the organization's activities are exempt from FECA's definitions of "contribution" and "expenditure." First General Counsel's Report at 3, MUR 5378. Only non-profit organizations

² WOSU concluded, based on the Debate Guidelines, that Don Eckhart, an Independent candidate, was qualified to participate in the Debate because his support met the Guideline's five percent support threshold. *See id.*

described in 26 U.S.C. §§ 501(c)(3) or 501(c)(4) that do not endorse, support, or oppose political candidates or political parties may stage candidate debates. 11 C.F.R. § 110.13(a)(1). The debate must include at least two candidates and not be structured to promote or advance one candidate over another. 11 C.F.R. §§ 110.13(b)(1) and (2). Organizations that stage candidate debates must use pre-established objective criteria to determine which candidates may participate in the debate. 11 C.F.R. § 110.13(c). The staging organization may not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate. *Id.* A nonprofit organization described in 11 C.F.R. § 110.13(a)(1) may use its own funds and may accept funds donated by corporations or labor organizations to defray costs in staging candidate debates held in accordance with 11 C.F.R. § 110.13 without being in violation of FECA. 11 C.F.R. §§ 114.4(f)(1) and (3). First General Counsel's Report at 6, MURs 4987, 5004, 5021.

The only issue here is whether Mr. Noble's exclusion from the Debate was made in accordance with 11 C.F.R. § 110.13(c)'s requirement that the exclusion be based on "pre-established objective criteria." If the Commission determines that Mr. Noble was excluded from the Debate based on the pre-determined and objective criteria in the Debate Guidelines, then the Commission must find that there is no reason to believe that CMC violated 2 U.S.C. §§ 433 or 434 by failing to registering and file reports as a political committee.

**WOSU's Debate Guidelines Provided Pre-established Objective Criteria
for the Exclusion of Mr. Noble from the Debate**

There is no doubt that the Debate Guidelines, both on their face and as applied to Mr. Noble, comply with 11 C.F.R. § 110.13(c). First, the Debate Guidelines were established long before Mr. Noble even became a candidate. The Debate Guidelines were established by WOSU in March 2008 - at least six months prior to Mr. Noble's announcement of his candidacy (September 15, 2008) and Mr. Buckel's request that WOSU include Mr. Noble in the Debate (October 8, 2008). Second, the Debate Guidelines contain, and WOSU relied on, objective criteria to exclude Mr. Noble from the Debate. The Debate Guidelines specifically state that third-party and independent candidates would be eligible to participate in the Debate if they had a measurable chance of election as demonstrated by receiving at least 5% support in a poll or public opinion survey by an independent organization. *See* Exhibit A. Because Mr. Noble did not receive that level of support, WOSU determined that he was ineligible to participate in the Debate. The independent candidate, Don Eckhart, received the prerequisite 5% level of support and WOSU, following the same Debate Guidelines, determined that Mr. Eckhart was eligible to participate in the Debate. The Debate Guidelines clearly comply with the requirement of 11 C.F.R. § 110.13(c) that exclusions from a candidate debate be based on pre-established objective criteria.

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Mr. Buckel may believe that the exclusion of Mr. Noble from the Debate was "unfair" in that his preferred candidate was excluded from the Debate, but the law does not require perfect fairness. A long line of Commission precedents have held that if the debate staging organization meets the requirements of 11 C.F.R. § 110.13(a)(1) and stages debates in accordance with 11 C.F.R. §§ 110.13(b) and (c) and 114.4(f), the organization's activities are exempt from FECA's definitions of "contribution" and "expenditure." First General Counsel's Report at 2-3, MUR 5378 (Commission on Presidential Debates); First General Counsel's Report at 5-6, MURs 4987, 5004, 5021 (Commission on Presidential Debates); *see also* First General Counsel's Report at 2, MURs 5817, 5836, 5847, 5852, 5858, and 5863. Here the Debate was clearly held in accordance with the requirements of 11 C.F.R. §§ 110.13 and 114.4(f) and that is the end of the inquiry – WOSU and CMC are entitled to the safe harbor established by 2 U.S.C. § 431(9)(B)(ii) and the Commission may not find reason to believe that WOSU or CMC violated 2 U.S.C. §§ 433 or 434.

**CMC Did Not Develop WOSU's Debate Guideline or Determine that
Mr. Noble Failed to Qualify for the Debate Under the Debate Guidelines**

In addition, there is a separate basis for the Commission to find that there is no reason to believe that CMC violated 2 U.S.C. §§ 433 or 434. CMC was not involved in any way in the development of WOSU's Debate Guidelines. The Debate Guidelines were created by WOSU in March 2008 - months before WOSU and CMC agreed to co-sponsor the Debate. Furthermore, the determination to exclude Mr. Noble from the Debate was made exclusively by WOSU, not CMC, in accordance with the Debate Guidelines. The Debate Guidelines state specifically that, "The final decision of a candidate's inclusion in a debate rests with the management of WOSU Public Media." Exhibit A at 2. Moreover, when CMC entered into the agreement to co-host the Debate, WOSU had already determined that Mr. Noble was ineligible to participate because he had not garnered the requisite five percent support. CMC had nothing to do with the determination to exclude Mr. Noble from the Debate.

Conclusion

There is no basis in law or fact for the Commission to find reason to believe that CMC violated 2 U.S.C. §§ 433 or 434. Mr. Buckel's amended complaint alleges that WOSU's decision to exclude Mr. Noble from the Debate amounted to both WOSU and CMC operating as political committees by making contributions or expenditures in the form of "preferential exposure" and "vote-receiving advantage" to the benefit of the three candidates who did participate in the Debate. The record shows, however, that both WOSU and CMC complied with the requirements of 11 C.F.R. §§ 110.13 and 114.4(f) and therefore are protected against this

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allegation by the safe harbor of 2 U.S.C. § 431(9)(B)(ii). Furthermore, CMC played no role in developing the Debate Guidelines or applying them to exclude Mr. Noble from the Debate. Accordingly, CMC respectfully requests that the Commission activate this case and quickly dismiss Mr. Buckel's amended complaint.

Sincerely,



Brett G. Kappel

Counsel for the Columbus Metropolitan Club

BGK/jrh

Enclosures

cc: Jane Scott, Executive Director

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EXHIBIT A

EXHIBIT B

Results of SurveyUSA Election Poll #14403



Geography: OH 15th Congressional District
Data Collected: 09/19/2008 - 09/21/2008
Release Date: 09/22/2008

Sponsors:
Roll Call Newspaper, (Capitol Hill), WCMH-TV (Columbus)

In Ohio 15, Democrats Have Opportunity to Pick-Up Seat Held by Retiring Republican Pryce: In an election for U.S. House of Representatives today, 09/22/08, six weeks till votes are counted, to fill the open seat in Ohio's 15th Congressional District, Democrat Mary Jo Kilroy maintains a slight edge over Republican Steve Silvers, within the survey's margin of sampling error, according to a SurveyUSA poll conducted for Roll Call, the newspaper of Capitol Hill, and WCMH-TV Columbus. Today, it's Kilroy 47%, Silvers 42%, Independent Don Eckhart 5%, Libertarian Mark Noble 3%. Compared to a SurveyUSA poll conducted 6 weeks ago, the Democrat Kilroy is flat, the Republican Silvers is down 2. The Democrat had led by 3, now leads by 5. This movement comes from two groups: voters age 50+, where there has been a 7-point swing to the Democrat; and whites, where there has been a 5-point swing to the Democrat. Kilroy has a Net Favorability of Plus 5. Silvers has a Net Favorability of Plus 10. Deborah Pryce has a Net Favorability of Plus 21. John McCain has a Net Favorability of Plus 4. Barack Obama has a Net Favorability of Plus 3.32% In the district approve of the job President Bush is doing, 14% approve of the job the US Congress is doing. By 2-1, voters in the district say they prefer a candidate for Congress who says alternative sources of energy are key to the country's future rather than a candidate who says that offshore drilling is key to the country's energy independence. A majority in the district say that Congress should focus on the economy ahead of all other issues. Of those focused on the economy, Kilroy leads by 14 points. Of those focused on terrorism, Silvers leads 7-1.

Filtering: 900 adults were interviewed by SurveyUSA 09/19/08 through 09/21/08. Of them, 732 were registered to vote in Ohio's 15th District. Of the registered voters, 640 were determined by SurveyUSA to be likely to vote in the November general election. Republican Pryce was first elected to Congress in 1982. She announced in 2007 that she would not seek a 9th term. The District, which extends Westward from Columbus through portions of Franklin, Union and Madison counties, last elected a Democrat when John F. Kennedy was president.

1 If the election for U.S. House of Representatives, were today, would you vote for ... (names rotated) Republican Steve Silvers? Democrat Mary Jo Kilroy? Independent Don Eckhart? Or Libertarian Mark Noble?

840 Likely Voters	All	Gender		Age					<50 / 50+				Race				Party Affiliation		
		Male	Female	18-34	35-49	50-64	65+	18-49	50+	White	Black	Hispani	Other	Republ	Democr	Indepen			
Margin of Sampling Error: +/-4%																			
Steve Silvers (R)	42%	45%	39%	37%	45%	41%	45%	41%	42%	44%	16%	"	"	80%	10%	37%			
Mary Jo Kilroy (D)	47%	44%	51%	52%	45%	47%	45%	48%	46%	48%	73%	"	"	12%	83%	43%			
Don Eckhart (I)	5%	5%	6%	5%	5%	7%	4%	5%	6%	6%	3%	"	"	5%	3%	9%			
Mark Noble (L)	3%	4%	2%	4%	3%	2%	2%	3%	2%	2%	3%	"	"	1%	1%	8%			
Undecided	3%	3%	3%	2%	2%	3%	4%	2%	4%	3%	5%	"	"	2%	3%	4%			
Total	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%			
Composition of Likely Voters	100%	51%	49%	22%	31%	30%	16%	54%	46%	88%	7%	3%	2%	35%	40%	22%			